No. 1945.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

The Atchison, Topeka and Santa Fe Railway Company, a corporation,
Plaintiff in Error,
vs.
Alice M. Gilliland,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

W. O. Morton and
Harry A. Hollzer,
Attorneys for Defendant in Error.
Newman Jones,
Of Counsel.

Parker & Stone Co., Law Printers, 233 New High St., Los Angeles, Cal.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

The Atchison, Topeka and Santa Fe Railway Company, a corporation, *Plaintiff in Error,* *vs.* **Alice M. Gilliland,** *Defendant in Error.*	No. 1945.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is an action brought by the defendant in error (plaintiff in the court below) to recover damages for personal injuries suffered by her while a passenger on one of the railway trains of the plaintiff in error.

No question was raised in the court below as to the jurisdiction of the court. The railway company, on the contrary, answered and went to trial upon the merits, and three days of the time and attention of the Circuit Court and of the jury of twelve men empaneled there-

in, were consumed in the trial, at the conclusion of which the jury returned a verdict in favor of the plaintiff in the action for the sum of five thousand dollars, and judgment for that amount was thereupon entered. [Tr. p. 21.]

The assignments of error, set out on page 27 of the transcript, are as follows:

I.

"That it appears upon the face of the judgment roll that said court erred in entering judgment for the plaintiff therein.

II.

"That it appears upon the face of the record that said court erred in refusing to grant the defendant an extension of time for proposing and settling a bill of exceptions.

III.

"That it appears upon the face of the record in said action that said court erred in refusing to settle a bill of exceptions therein proposed by the defendant."

But it nowhere, except possibly inferentially from the order of the court refusing the settlement of the same [Tr. p. 24] appears that the plaintiff in error ever made any bill of exceptions; and it nowhere either inferentially or otherwise, appears that it ever served the same, or presented the same within the time allowed by law, or that it ever within the time allowed by law applied to the court or to anyone else for an extension of time for proposing or settling the same; and by reference to its brief on file we find that the assignments in this connection are passed without pretense of argument and are thereby abandoned; and there is not now before this court any contention whatever to the effect that the plaintiff in

error has failed without fault upon its part to bring before this court the evidence whereby it might appear or be made to appear whether or not this was a case in which the trial court was in fact without the jurisdiction necessary to render the judgment in question.

But in the place of these abandoned assignments the plaintiff in error now for the first time asserts that the Circuit Court was without jurisdiction, and makes this its first and main, and only reliance.

ARGUMENT.

The Atchison, Topeka & Santa Fe Railway Company v. Frederickson, 177 Fed. 206, was another case in which the same plaintiff in error, represented by the same able counsel as in this case, carefully reserved its objection to the jurisdiction of the Circuit Court until the case was in this court on writ of error. The court, in its decision in that case, say that

"There was no ground of jurisdiction other than diversity of citizenship of the parties, and the only allegation as to the citizenship of the defendant in error was that he is an inhabitant of the city of Los Angeles in the county of Los Angeles, state of California. On the witness stand he testified that his 'home' was in Detroit, Mich. * * * Absence of sufficient averments of diversity of citizenship *or of facts in the record showing such diversity, is fatal;* and the defect cannot be waived by the parties, nor can their consent confer jurisdiction. * * *

"It follows that the judgment must be reversed, and the case remanded to the Circuit Court, with instructions to dismiss the same."

And the plaintiff in error in this case in its brief on file herein cites that case and that case only as an all sufficient authority upon which it bases its application for the same result in this case.

We respectfully propose, however, to point out wherein the situation and conduct and attitude of the plaintiff in error in this case differs substantially and materially from its situation and attitude and conduct in that one, and wherein and why it is that the decision of the court in that case is not authority in this and does not and should not legally, or reasonably or properly demand, or justify, the same result arrived at in that case.

(a). In the first place, then, it is to be noted that in the Frederickson case, the plaintiff in error carefully prepared and perfected its bill of exceptions,—that is to say, the higher evidence,—whereby it appeared, and by reason of which this court was not only enabled but compelled to know and take cognizance of the fact that the plaintiff had not only failed to allege the necessary diversity of citizenship, but that he had failed also to prove it at the trial and that the Circuit Court was, therefore, at the time it gave judgment, actually without the jurisdiction which, under and according to the doctrine of the courts in Sun Printing & Publishing Ass'n. v. Edwards, 194 U. S. 377, and in First Natl. Bank v. Crowley, 183 Fed. 578, it would have had if the plaintiff, notwithstanding the defect of his complaint, had shown by his proofs that the necessary diversity in fact existed. But in the case at bar the plaintiff in error, as we have shown, fails, without any excuse whatever, to bring before this court this higher evidence.

It is a presumption of the law, which has been codified into the statutes of this state "That higher evidence would be adverse from inferior being produced." (Sec. 1963, Sub. 6, C. C. P.) It is true this presumption is ordinarily rebuttable. There is in this case, however, nothing to rebut it, but on the contrary every reasonable consideration to sustain it.

We do not pretend or contend that the jurisdiction of the Circuit Court can be made to appear by presumption. But we do contend that it cannot be made to disappear at the will or pleasure of an unsuccessful litigant, when once it has appeared and attached in and by the evidence at the trial of the case upon its merits; and that it will be and should be conclusively presumed as against the litigant who omits all the evidence from his record on writ of error, that the evidence, if included, would have sustained the judgment.

The distinguished counsel for the plaintiff in error,—deservedly in the highest standing in this and every court where they are known,—have not for three days consumed the time and attention of the Circuit Court and the jury therein knowing all the time and until after the verdict and judgment therein, that jurisdiction in that court did not in point of fact exist, and they will not say so; and they ought not to be admitted (if such a thing were conceivable) to be heard to say so; and no inference or presumption of that sort can be entertained or considered. The conclusion, on the contrary, is irresistible and not to be denied that the jurisdiction did in fact sufficiently appear in the evidence, and that the case was in fact and in good faith tried to its final ending in

the Circuit Court by the parties and the court and all concerned upon that undisputed and accepted theory and understanding.

Nor is this conclusion in conflict with the point really decided in any of the cases cited by the plaintiff in error in its brief in the Frederickson case, or by this court in its opinion therein. In every one of those cases in which there was a trial upon the merits, the evidence whereby it affirmatively appeared that jurisdiction had not in point of fact been proven in the trial court was brought up by the plaintiff in error or the appellant, by bill of exceptions or otherwise, and was before the Appellate Court. And we respectfully submit that the decisions in those cases are not authority in this, and that the conclusion drawn therein is not the one that should be arrived at in this.

It is admitted that jurisdiction, in the federal courts, cannot be conferred by consent, nor be made to appear by presumption merely. But the conduct of the court and of the parties may be such that it cannot be doubted that jurisdiction did in fact appear and attach; and it is upon this principle that we rely in support of the judgment in this case.

Thus, in *Railway Company v. Ramsey*, 22 Wall. 322, 328, which was a case removed from a state court, the averment of citizenship did not appear in the pleadings, but the parties, by stipulation and agreement placed on file, admitted that the cause was brought into the Circuit Court by transfer from the state court in accordance with the statutes in such case provided; and by the same stipulation it was made to appear that all the original

files in the cause had been destroyed by fire. The court held that, while consent of parties cannot give the courts of the United States jurisdiction, they may admit facts which show jurisdiction, and the courts may act judicially upon such admission, *and that it would be presumed that the petition for removal stated facts sufficient to entitle the party to have the transfer made.* Said the Chief Justice, speaking for the court: *"As both the court and the parties accepted the transfer, it cannot for a moment be doubted that the files did then contain conclusive evidence of the existence of the jurisdictional facts."*

(b). And in the second place, the conclusion and decision arrived at in the Frederickson case,—that is to say, "that the judgment must be reversed, and the cause remanded to the Circuit Court, with instructions to dismiss the same,"—is not an authority, or conclusive in this case, for the additional reasons:

First, there was not in that case, so far as appears from the briefs on file, any representation, or intimation, nor the slightest suggestion to this court upon the part of the defendant in error, that the diversity of citizenship necessary to clothe the court with jurisdiction, did in point of fact exist; and,

Secondly, the defendant in error in that case did not, (so far at least as appears by his brief on file, and so far as we are informed), ask of this court that in the event of a reversal it might be with instructions to the lower court to permit, if requested, an amendment and hearing thereon upon the question of jurisdiction alone, and the entry of final judgment in accordance therewith.

In the case now at bar the defendant in error respectfully begs leave to inform this court that she is and at the time of the commencement of this action was and long has been, a citizen and domiciled in and resident of the state of New York, and that the plaintiff in error herein is and was at the time of the commencement of this action a corporation duly organized and existing under the laws of the state of Kansas, and having its principal office and place of business in that state, and that it therefore is, and within the meaning and contemplation of the law was, at the time of the commencement of this action a citizen and resident of and domiciled in that state; and that according to our understanding, both now and at the time of the trial in the Circuit Court, these facts did sufficiently appear in evidence at and upon the said trial; and in this connection the defendant in error respectfully requests of this court that in the event of a reversal of the judgment of the lower court by this court it may be with instructions to the court below to permit the defendant in error to amend its complaint by inserting therein the necessary and proper allegations in respect of the citizenship and domicile and residence of the defendant in error, as above suggested, and that if these jurisdictional averments be denied by the plaintiff in error, that the issue thereby made be tried in the Circuit Court according to the practice with respect to pleas in abatement; but that the verdict heretofore rendered by the jury in that court be not set aside; and that if the issue in respect of the jurisdictional averments referred to be determined in favor of the defendant in error, judgment in her favor be given and made as though those

averments had been contained in her complaint from the beginning.

And in support of this request, and in addition to the very long list of cases that might be cited for the purpose of showing the practice of the Circuit Courts of Appeal to reverse (where necessary or proper), with instructions to the lower courts to allow an amendment in respect of the jurisdictional averments, if requested, we respectfully and more particularly refer to the decisions of the Circuit Court of Appeals of the First Circuit, given January 20th, 1898, in the case of *Fitchburg Ry. Co. v. Nichols,* 85 Fed. 869, and to the decision of the Circuit Court of Appeals of the Seventh Circuit, given January 14th, 1908, in the case of *Grand Trunk Western Ry. Co. v. Reddick,* 160 Fed. 898.

The case first mentioned was an action at law to recover damages for personal injuries received by the plaintiff while in charge of cattle on a railway train. In the Circuit Court the verdict and judgment were for the plaintiff and the defendant sued out a writ of error to the Circuit Court of Appeals, and the decision of that court in that case is as follows:

"Putnam, Circuit Judge. The record in this case contains the suitable allegations to show the citizenship of the corporation defendant in the court below, but it fails in this respect as to the plaintiff below. There are only two courses open. If the plaintiff below is an alien, or a citizen of some state other than Massachusetts, the record may be amended in this court according to the truth by the consent of both parties. Fletcher v. Peck, 6 Cranch 87, 127; Kennedy v. Bank, 8 How. 586, 611; U. S. v. Hopewell, 51 Fed. 798, 800, 2 C. C. A. 510; Nashua & L. R. Corp. v. Boston & L. R. Corp., 9 C. C. A. 468, 61 Fed. 237, 245. If this is not done, the judg-

ment of the court below must be reversed. It is not necessary to set aside the verdict, as the court below may allow an amendment, in accordance with the facts, to supply the defect, as well after verdict as before, provided it gives the adverse party an opportunity to meet the new issue thus raised, if that party is advised to do so. All this is not only in accordance with the general principles of law, but is emphasized by section 954 of the Revised Statutes, and paragraphs 1 and 3 of rule 11 of the Circuit Court. Of course, if an amendment is not made, or the issue made by it is not sustained, it will be the duty of the court below to dismiss the suit. It is ordered that the judgment of the Circuit Court be reversed, without costs for either party in this court, and that the case be remanded to the Circuit Court for further proceedings according to law, unless an amendment is made in this court on or before February 1, 1898, as provided in this opinion."

In the case of *Grand Trunk Western Ry. Co. v. Reddick, supra*, the deceased, Leiferman (represented by the plaintiff, as administrator), was killed in an accident in Illinois on the railroad of the defendant railway company. The verdict and judgment in the Circuit Court were for the plaintiff and the defendant prosecuted a writ of error to the Circuit Court of Appeals, and that court in its decision say that:

"The trial was free from error throughout. But the judgment must be reversed on account of plaintiff's omission respecting citizenship. A question remains. How far ought the proceedings to be opened up? Defendant confessed the cause of action. The damages were properly proved and assessed. The justice of the matter is that plaintiff should not be required to go through another trial unless that course is unavoidable. Jurisdiction and merits are separate questions, and may properly be determined separately. Want of jurisdiction, by the very nature of the question, is merely a matter of abatement. If plaintiff had averred that he was a citizen of

Illinois and defendant a corporation organized and existing under the laws of Michigan, and if defendant could honestly have challenged those allegations or either of them, the issue could have been determined in advance of a trial on the merits. We see no just reason why, after a trial on the merits, the logically separable matter of jurisdiction should not be determined. Fitchburg R. Co. v. Nichols, 85 Fed. 869, 29 C. C. A. 464; Watson v. Bonfils, 116 Fed. 157, 53 C. C. A. 535; Everhart v. Huntsbille College, 120 U. S. 223, 7 Sup. Ct. 555, 30 L. Ed. 623; Menard v. Goggan, 121 U. S. 253, 7 Sup. Ct. 873, 30 L. Ed. 914. If, after plaintiff amends, the jurisdictional averments should be denied, the issue may be tried according to the practice with respect to pleas in abatement.

"The judgment is reversed, with the direction to proceed in conformity with this opinion."

We respectfully submit that the sense of justice which prevailed and controlled in the cases referred to should control also in this case in the event that this court should find it necessary or proper to reverse the judgment of the Circuit Court. We rely, however, upon the reasons and authority hereinbefore presented in support of that judgment, and respectfully submit that the same should be affirmed. If, however, it be reversed, we respectfully request that it be with directions or instructions to the Circuit Court as hereinbefore indicated.

Respectfully submitted,

W. O. Morton and

Harry A. Hollzer,

Attorneys for Defendant in Error.

Newman Jones,

Of Counsel.